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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 549

NASH-BREYER MOTOR COMPANY, FORMERLY TROY MOTOR SALES COMPANY, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

THEODORE B. BENSON,
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ARTHUR H. DEIBERT,
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Of Counsel.

(35,471)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 549

NASH-BREYER MOTOR COMPANY, FORMERLY TROY MOTOR SALES COMPANY, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

Theodore B. Benson, on behalf of the Nash-Breyer Motor Company, formerly Troy Motor Sales Company, a body corporate, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in the above-entitled cause on June 16, 1930, amended July 16, 1930, the time for filing petition for

writ of certiorari having been extended 60 days by order of the Chief Justice entered September 12, 1930.

A.

Summary Statement of the Matter Involved.

The petitioner duly filed its return of income and profits taxes for the fiscal years June 30, 1920 and 1921, with the collector of internal revenue at Los Angeles, California.

On November 23, 1925, the petitioner filed with the Board of Tax Appeals a petition for the redetermination of a deficiency in the amount of $6,139.88 for the year June 30, 1921, and on February 6, 1926, the petitioner filed with the Board a petition for the redetermination of a deficiency, in the amount of $7,489.25 for the year June 30, 1920. Thereafter the petitioner filed an amended petition and the causes were consolidated and came on for hearing before the Board and the issues raised in the amended petition and the amended answer were decided by the Board adversely to the petitioner and the Board on March 16, 1929, entered its orders of redetermination.

On August 2, 1929, there was filed with the Board of Tax Appeals a stipulation of venue in which the parties agreed by their respective attorneys that the decision of the Board might be reviewed by the United States Circuit Court of Appeals for the Second Circuit.

On August 2, 1929, the petitioner filed with the Board its petition for review of the decisions. The petition was for review by the United States Circuit Court

of Appeals for the Second Circuit. On the same day a copy of the petition was served on the respondent.

The cause came on for a hearing before the United States Circuit Court of Appeals for the Second Circuit on May 12, 1930, and on June 9, 1930, that court decided that venue could not be stipulated by the parties and entered an order dismissing the petition.

The provisions of the Revenue Act of 1926 as applicable here are those contained in Sections 1001 and 1002 of the Revenue Act of 1926 (44 Stat. 109, 110). Section 1002 is printed in full in the brief in support of the petition for the writ.

B.

Reasons Relied on for the Allowance of the Writ.

The Circuit Court of Appeals for the Second Circuit has decided an important question which is involved in a number of cases in which the parties have, pursuant to the provisions of Section 1002(*d*) of the Revenue Act of 1926, stipulated venue in a circuit court of appeals other than those of the circuits in which are located the offices of the collectors with whom the returns were filed.

This question has never been passed on by this Court but should be, and the court below should be reversed for the following reasons:

1. The court below has erred in its interpretation of the express provisions of the statute and has reached a conclusion contrary to the clearly stated meaning of Congress and contrary to well-settled rules of statu-

tory construction and contrary to judicially recognized rules of grammar and rhetoric.

2. The court below has refused to assume and exercise a jurisdiction expressly conferred on it by Congress by Section 1002(*d*) of the Revenue Act of 1926.

3. The decision of the court below conflicts directly with the conclusion reached by it in the case of Greylock Mills *v.* Commissioner of Internal Revenue, 31 Fed. (2d) 655, certiorari denied 50 S. Ct. 25; and with the decision of the Court of Appeals of the District of Columbia in Joy Floral Company *v.* Commissioner, 29 Fed. (2d) 865.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the Circuit Court of Appeals for the Second Circuit, and that the judgment of that court entered June 16, 1930, and amended July 16, 1930, be reversed by this Honorable Court, and that the cause be remanded for further proceedings on errors assigned in the petition to review the decisions of the United States Board of Tax Appeals.

THEODORE B. BENSON,
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 549

NASH-BREYER MOTOR COMPANY, FORMERLY TROY MOTOR SALES COMPANY, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion in the Circuit Court of Appeals for the Second Circuit was handed down on June 9, 1930, reported in 42 Fed. (2d) 192, and the order for mandate was entered on June 16, 1930, and an order recalling and amending order for mandate was entered July 16, 1930.

Order Extending Time for Application For Writ.

On motion of the petitioner and on September 12, 1930, the Honorable the Chief Justice of the United States entered an order extending the time for the filing of petition for a writ of certiorari for a period of 60 days from September 16, 1930.

The grounds stated in the motion for the extension of time were that the petitioner intended to make an application to the United States Circuit Court of Appeals for the Ninth Circuit for leave to amend the petition to review the decision of the Board of Tax Appeals to read "In the United States Circuit Court of Appeals for the Ninth Circuit" instead of "In the Circuit Court of Appeals for the Second Circuit", wherever the words appear in the title or body thereof. The application for leave to amend has been duly made by the petitioner and the Circuit Court of Appeals for the Ninth Circuit on October 27, 1930, stated that it felt that the motion should not be passed on until this Court has considered the question here involved and has decided whether or not the decision of the Circuit Court of Appeals for the Second Circuit in dismissing the petition for review of the decision of the Board of Tax Appeals is correct. A copy of the opinion of the Circuit Court of Appeals for the Ninth Circuit is printed as an appendix hereto.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under the Judicial Code, Section 240, as amended by the Act of

February 13, 1925, 43 Stat. 938, and Section 1003(*a*) of the Revenue Act of 1926, 44 Stat. 110.

The date of the judgment to be reviewed is June 16, 1930. The time for the filing of the application for the writ was extended to November 15, 1930. Application for the writ was presented November 15, 1930.

This is a corporation income tax case arising under the Revenue Acts of 1918 and 1921, in which an appeal was taken from the United States Board of Tax Appeals to the United States Circuit Court of Appeals for the Second Circuit, pursuant to a Stipulation of Venue (R. 23) entered into under the provisions of Section 1002(*d*) of the Revenue Act of 1926. The court below held that venue could not be so stipulated and entered an order dismissing the petition.

This Court has never construed Section 1002 of the Revenue Act of 1926 and has never considered the right of the parties to stipulate venue to review a decision of the Board of Tax Appeals in a circuit court of appeals other than the circuit in which is located the office of the collector to whom the return was made.

III.

Statement of the Case.

The petitioner and the respondent entered into a Stipulation of Venue for the review of the decision of the Board of Tax Appeals in the United States Circuit Court of Appeals for the Second Circuit (R. 23). The stipulation reads in part:

> "This agreement is made under and pursuant to the provisions of Section 1002 of the Revenue Act of 1926."

The Petition for Review was addressed to the Second Circuit and a transcript of the record was transmitted to such court.

IV.

The Statutes Involved.

The statutes here involved are Sections 1001 and 1002 of the Revenue Act of 1926 (44 Stat. 109, 110), relating to the review of a decision of the Board of Tax Appeals by a circuit court of appeals or by the Court of Appeals of the District of Columbia. Section 1002 of the Act reads:

> "SEC. 1002. Such decision may be reviewed:
>
> (*a*) In the case of an individual, by the Circuit Court of Appeals for the circuit whereof he is an inhabitant, or if not an inhabitant of any circuit, then by the Court of Appeals of the District of Columbia.
>
> (*b*) In the case of a person (other than an individual), except as provided in subdivision (*c*), by the Circuit Court of Appeals for the circuit in which is located the office of the collector to whom such person made the return, or in the case such person made no return, then by the Court of Appeals of the District of Columbia.
>
> (*c*) In the case of a corporation which had no principal place of business, or principal office or agency in the United States, then by the Court of Appeals of the District of Columbia.
>
> (*d*) In the case of an agreement between the Commissioner and the taxpayer, then by the Cir-

cuit Court of appeals for the circuit, or the Court of Appeals of the District of Columbia, as stipulated in such agreement."

V.

Specification of Errors.

(1) The Circuit Court of Appeals for the Second Circuit erred in its construction of Section 1002(*d*) of the Revenue Act of 1926 and in holding that venue to review the decision of the Board of Tax Appeals could not be conferred on it by stipulation.

(2) The court below erred in refusing to assume and exercise the jurisdiction conferred on it by Section 1002(*d*) of the Revenue Act of 1926 in the case of an agreement.

VI.

Argument.

In Section 1002 Congress has defined the venue of an appeal from a decision of the Board. In the four subparagraphs of the section Congress has made separate provisions for different cases. In subparagraph (*b*) venue to review a decision of the Board in the case of a corporation is placed in the circuit court of appeals in which is located the office of the collector to whom the return was made. Had Congress not added any further provisions to the section the decision of the court below would be correct. Congress did, however, make a separate and distinct provision

in subparagraph (*d*) of the section which as applicable here reads:

> "In the case of an agreement * * * then by the Circuit Court of Appeals for the circuit, or the Court of Appeals of the District of Columbia, as stipulated in such agreement."

Congress has provided for review in the case of an agreement and for review in the absence of an agreement. *In the case of an agreement* the review is in the circuit court of appeals or in the Court of Appeals of the District of Columbia as stipulated in such agreement. *In the absence of an agreement* the review, in the case of a corporation, is in the circuit court of appeals in which is located the office of the collector to whom the return was made.

Counsel submits that Section 1002 is to be read in accordance with its express terms to mean:

> "Such decision may be reviewed * * * in the case of an agreement * * * by the Circuit Court of Appeals for the circuit * * * as stipulated."

The decision of the court below is in direct conflict with the clearly expressed intent of Congress appearing in the wording and in the arrangement of the subparagraphs of Section 1002 of the Revenue Act of 1926.

The question here involved is one of importance, for counsel has been advised that stipulations of venue have been entered into in a number of cases to review the decisions of the Board of Tax Appeals. The position of counsel is recognized by Judge Wilbur of the

Ninth Circuit in the opinion handed down on the motion to amend the petition to review the decision of the Board of Tax Appeals, which opinion is printed as an appendix hereto.

In at least two cases which have been considered on review from the Board of Tax Appeals, the provisions of Section 1002(*d*) of the Revenue Act of 1926 have been followed. In Greylock Mills *v.* United States, 31 Fed. (2d) 655, certiorari denied, 50 S. Ct. 25, venue was stipulated in exactly the same manner as in this case and to the same circuit court of appeals. In that case the circuit court of appeals proceeded to consider the merits of the case and this court denied the writ with the result that the decision of the Board of Tax Appeals stands reviewed and the decision on review has become final.

In Joy Floral Company *v.* Commissioner, 29 Fed. (2d) 865, venue was stipulated to the Court of Appeals of the District of Columbia, which court reviewed the decision of the Board of Tax Appeals and the decision on review stands as the final determination of the matter in controversy.

The petitioner submits that the holding of the court below in this case conflicts directly with its holding in the Greylock Mills case and with the holding of the Court of Appeals of the District of Columbia in the Joy Floral Company case and for this reason the writ should be granted.

Conclusion.

The petitioner respectfully submits that the holding of the court below is clearly erroneous and in direct

conflict with the express provisions of Section 1002 of the Revenue Act of 1926 and with the decisions in the Greylock Mills *v.* United States, *supra*, and Joy Floral Company *v.* Commissioner, *supra*, and that this case is one of importance and calling for the exercise by this Court of its supervisory powers and to such end that the writ of certiorari be granted and that this Court should review the decision of the Circuit Court of Appeals for the Second Circuit and finally reverse it, and remand the case for further proceedings on the merits.

Respectfully submitted,

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APPENDIX.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 6241.

NASH-BREYER MOTOR COMPANY, Formerly Troy Motor Sales Company, *Petitioner*,

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

Upon Petition to Review an Order of the United States Board of Tax Appeals.

Before RUDKIN and WILBUR, Circuit Judges, and KERRIGAN, District Judge.

WILBUR, *Circuit Judge:*

After a determination by a Board of Tax Appeals the Nash-Breyer Motor Company filed a petition for review by the United States Circuit Court of Appeals of the second circuit in pursuance of and in accordance with a stipulation entered into by the Commissioner of Internal Revenue and petitioner. The Circuit Court of Appeals of the second circuit dismissed the petition for lack of jurisdiction (Nash-Breyer Motor Co., etc., *v.* Commissioner, 42 F. (2d) 192 upon the authority of its decision in Mass. Fire & Marine Ins. Co. *v.* Commissioner of Internal Revenue, decided the same day (June 9, 1930, 42 F. (2d) 189) following the decision of the Circuit Court of Appeals of the eighth circuit in Spring Canyon Coal Co. *v.* Commissioner, 764 F. (2d) 764. The case was remanded to the Board of Tax Appeals without prejudice to further proceeding to

transfer review to the proper court. Petitioner applied to the Board of Tax Appeals to permit the amendment of the petition for review by inserting in lieu of the Circuit Court of Appeals of the second circuit the Circuit Court of Appeals of the ninth circuit. This application was denied.

The six months' period allowed by the statute for filing petition for review has expired. Application is now made to this court for leave to amend the petition for review by inserting therein the Circuit Court of Appeals of the ninth circuit in lieu of the Circuit Court of Appeals of the second circuit, upon the ground that jurisdiction has vested in this court. If, by virtue of the stipulation and the petition for appeal in pursuance thereof, jurisdiction was vested in the Circuit Court of Appeals of the second circuit, the decision of that court dismissing the petition would not give jurisdiction to this court, nor would the order of this court allowing the requested amendment in any wise change the situation. The primary question involved on this application is, therefore, whether or not the Circuit Court of Appeals of the second circuit acquired jurisdiction of the appeal herein from the Board of Tax Review.

After examining the above mentioned decisions, the statutes and legislative reports therein referred to, we feel that the question of jurisdiction is so doubtful that we should not in this proceeding pass upon it until the proposed petition to the Supreme Court by the Petitioner to review the above mentioned decision of the Circuit Court of Appeals of the second circuit has been acted upon by that court.

(Endorsed:) Opinion. Filed Oct. 27, 1930, Paul P. O'Brien, Clerk.

